

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

No. CR 00-0505WHA

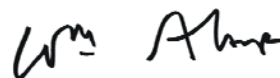
v.

CHARLES W. McCALL and
JAY M. LAPINE,

Defendants.

**PROPOSED CHARGE TO THE JURY
AND SPECIAL VERDICT FORM AFTER
FURTHER CHARGING CONFERENCE (NOVEMBER 16, 2009)**

Appended hereto are copies of the charge the Court expects to give to the jury and the special verdict form as revised after the further charging conference on November 16, 2009.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

1.
1

2 Members of the jury, now that you have heard all the evidence and arguments by
3 counsel, it is my duty to instruct you on the law that applies to this case. A copy of these
4 instructions will be available in the jury room for you to consult as necessary.

5 It is your duty to find the facts from all the evidence in the case. To those facts you
6 will apply the law as I give it to you. You must follow the law as I give it to you whether you
7 agree with it or not. You must not be influenced by any personal likes or dislikes, opinions,
8 prejudices or sympathy. That means that you must decide the case solely on the evidence
9 before you. You will recall that you took an oath promising to do so at the beginning of the
10 case. In following my instructions, you must follow all of them and not single out some and
11 ignore others; they are all equally important. You must not read into these instructions or into
12 anything the Court may have said or done as suggesting what verdict you should return — that
13 is a matter entirely up to you.

14 I will now discuss general rules for your deliberations.

2.
15

16 The charges against defendants are set forth in the indictment. The indictment itself is
17 not evidence and it will not be in the jury room during your deliberations. I will tell you in
18 these instructions what the counts are against defendants.

19 A separate crime is charged against defendants in each count. You must decide the
20 case of each defendant on each count separately. Your verdict on one count should not control
21 your verdict on any other count. Defendants have pleaded not guilty to the charges against
22 them. Defendants are presumed to be innocent and do not have to testify or present any
23 evidence to prove innocence and you may not draw any adverse inference from the fact that
24 defendants did not testify. Thus, defendants began the trial with a “clean slate” — with no
25 evidence against them. The government has the burden of proving every element of the
26 offenses here beyond a reasonable doubt. Anytime I say in these instructions that the
27 government has the burden of proof, it means proof beyond a reasonable doubt.
28

1 3.

2 Let me explain what “proof beyond a reasonable doubt” means. Proof beyond a
3 reasonable doubt is proof that leaves you firmly convinced that a defendant is guilty. It is not
4 enough for the government to prove that it is “more likely than not” that a defendant is guilty.
5 It is not required, however, that the government prove guilt beyond all possible doubt.

6 A reasonable doubt is a doubt based upon reason and common sense and is not based
7 purely on speculation. It may arise from a careful and impartial consideration of all the
8 evidence or from lack of evidence.

9 If after a careful and impartial consideration of all the evidence, you are not convinced
10 beyond a reasonable doubt that a defendant is guilty as charged, it is your duty to find that
11 defendant not guilty. On the other hand, if after a careful and impartial consideration of all the
12 evidence, you are convinced beyond a reasonable doubt that a defendant is guilty as charged, it
13 is your duty to find that defendant guilty.

14 4.

15 The evidence from which you are to decide what the facts are consists of:

- 16 1. The sworn testimony of witnesses, on both direct and
17 cross-examination, regardless of who called the witness; and
- 18 2. The exhibits which have been received into evidence.

19 5.

20 In reaching your verdict, you may consider only the types of evidence I have described.
21 Certain things are not evidence, and you may not consider them in deciding what the facts are.
22 I will list them for you:

- 23 1. Arguments and statements by lawyers are not evidence.
24 The lawyers are not witnesses. What they have said in
25 their opening statements, closing arguments and at other
26 times is intended to help you interpret the evidence, but it
27 is not evidence. If the facts as you remember them differ
28

1 from the way the lawyers have stated them, your memory
2 of them controls.

3 2. A suggestion in a question by counsel or the Court is not
4 evidence unless it is adopted by the answer. A question
5 by itself is not evidence. Consider it only to the extent it
6 is adopted by the answer. In this connection, as I have
7 told you, even when counsel appeared to be reading from
8 an FBI interview summary or other document not in
9 evidence, any such material read out loud by counsel is
10 not evidence. Only what the witness said under oath in
11 response to counsel's questions is evidence.

12 3. Objections by lawyers are not evidence. Lawyers have a
13 duty to their clients to consider objecting when they
14 believe a question is improper under the federal rules of
15 evidence. You should not be influenced by any question,
16 objection or the Court's ruling on it.

17 4. Testimony or exhibits that have been excluded or
18 stricken, or that you have been instructed to disregard, are
19 not evidence and must not be considered. In addition,
20 some testimony and exhibits have been received only for
21 a limited purpose; where I have given a limiting
22 instruction, you must follow it. To help you remember
23 which exhibits were received into evidence with a
24 limiting instruction, we have written the phrase "With
25 Limitation" on the exhibit tag for each exhibit so
26 received.
27
28

1 Other charts and summaries, however, have been received into evidence. Charts and
2 summaries are only as good as the underlying supporting material. You should, therefore, give
3 them only such weight as you think the underlying material deserves.

4 8.

5 During trial you heard audio recordings that were received in evidence. The transcripts
6 of these recordings were also shown to you, but they were not received in evidence, as I
7 explained to you at the time. The audio recording itself is the evidence, not the transcripts. If
8 you heard something on the recording different from what appeared in the subtitles, what you
9 heard is controlling.

10 9.

11 In deciding the facts in this case, you may have to decide which testimony to believe and
12 which testimony not to believe. You may believe everything a witness says, or part of it or
13 none of it. In considering the testimony of any witness, you may take into account:

- 14 1. The opportunity and ability of the witness to see or hear
15 or know the things testified to;
- 16 2. The ability of the witness to remember the events
17 testified to;
- 18 3. The witness' manner while testifying;
- 19 4. The witness' interest in the outcome of the case and any
20 bias or prejudice;
- 21 5. Whether other evidence contradicted the witness'
22 testimony;
- 23 6. The reasonableness of the testimony in light of all the
24 evidence; and
- 25 7. Any other factors that bear on believability.

26 The weight of the evidence as to a fact does not necessarily depend on the number of
27 witnesses who testify. Nor does it depend on which side called witnesses or produced
28

1 evidence. You should consider all of the evidence, according each item of evidence such
2 weight as you think it deserves.

3 10.

4 A witness may be discredited or impeached by contradictory evidence or by evidence
5 that, at some other time, the witness has said or done something or has failed to say or do
6 something that is inconsistent with the witness' present testimony. If you believe any witness
7 has been impeached and thus discredited, you may give the testimony of that witness such
8 credibility, if any, you think it deserves.

9 11.

10 Discrepancies in a witness' testimony or between a witness' testimony and that of other
11 witnesses do not necessarily mean that such witness should be discredited. Inability to recall is
12 common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a
13 transaction sometimes will see or hear it differently. Whether a discrepancy pertains to an
14 important matter or only to something trivial should be considered by you.

15 However, a witness willfully false in one part of his or her testimony is to be distrusted
16 in others. You may reject the entire testimony of a witness who willfully has testified falsely
17 on a material point unless, from all the evidence, you believe that the probability of truth
18 favors his or her testimony in other particulars. It is always, however, up to you to decide how
19 much weight to give any testimony by any witness.

20 12.

21 You have heard testimony from witnesses who pleaded guilty to crimes arising out of
22 the same events for which defendants are on trial. Their guilty pleas are not evidence against
23 defendants, and you may consider the pleas only in determining these witnesses' believability.

24 You have heard testimony from witnesses who entered cooperation agreements with
25 the government. This means that they agreed to cooperate with the government and to testify
26 on the government's behalf in exchange for a benefit from the government in the form of a
27 recommendation for a reduced sentence in connection with this case.

28

1 For these reasons, in evaluating the testimony of these witnesses, you should consider
2 the extent to which or whether the witnesses' testimony may have been influenced by any of
3 these factors. In addition, you should examine their testimony with greater caution than that of
4 other witnesses.

5 13.

6 You have heard testimony from persons who, because of education or experience, are
7 permitted to state opinions and the reasons for their opinions. Opinion testimony should be
8 judged just like any other testimony. You may accept it or reject it, and give it as much weight
9 as you think it deserves, considering the witness' education and experience, the reasons given
10 for the opinion, and all other evidence in the case.

11 14.

12 You are here to determine whether each defendant is guilty or not guilty of the crimes
13 charged in this case. Your determination must be made only from the evidence received at the
14 trial. Defendants are *not* on trial for any conduct or offense *not* charged in this case. You
15 should consider evidence about the acts, statements, and intentions of others, or evidence about
16 other acts of either defendant, *only* as they relate to the charges in the indictment.

17 15.

18 It is important for you to understand that a defendant in a criminal case has a
19 constitutional right not to testify. No presumption of guilt may be raised, and no inference of
20 any kind may be drawn, from the fact that a defendant in this case did not testify.

21 You have heard testimony that each of defendants made statements. It is for you to
22 decide (1) whether a defendant made the statement, and (2) if so, how much weight to give to
23 it. In making those decisions, you should consider all of the evidence about the statement,
24 including the circumstances under which a defendant may have made it.

25 16.

26 A separate crime is charged against defendants in each count. As I noted before, you
27 must decide each count separately. Your verdict on one count should not control your verdict
28 on any other count.

17.

You are free to deliberate over the counts in any order you think most effective. You may possibly determine that certain counts ought to be considered in light of each other and consider them out of strict numerical sequence. To repeat, you are not required to address them in strict numerical sequence, so long as you decide all of the counts eventually.

18.

It is true that the events and actions alleged in the indictment occurred some time ago. The prosecution of this case is not barred by any statute of limitations. As I told you at the beginning of this trial, there was a prior trial in this case, and it ended in a mistrial. The mistrial was not the fault of the government. It was not the fault of defendants. It was not the fault of the judge. Do not be concerned with this. It is your duty to decide the case without regard to the outcome of the prior trial.

You have heard evidence that, after the merger, McKessonHBOC conducted an internal investigation using an outside law firm and an outside accounting firm. Although certain aspects of certain interviews conducted in that investigation are in evidence, the findings and conclusions of that internal investigation have not been offered in evidence and would not be admissible. You should not speculate as to what were the findings and conclusions of the internal investigation. Instead, you must decide the case for yourselves based on the evidence before you in this trial.

19.

This case involves alleged violations of the federal securities laws. These laws were enacted in order to protect investors and to maintain the integrity of our national stock markets. The central focus of the federal securities laws is to provide investors and the marketplace with reliable information to make investment decisions. Publicly-traded companies may sell their securities to the general public, but are required to file reports making disclosures to the investing public of certain financial information under the federal securities laws.

You have heard evidence referring to reports to the SEC including Forms 10-K, Forms 10-Q, Forms 8-K and Forms S-4. These are reports that publicly-traded companies such as

1 HBOC and McKessonHBOC were required by law to file with the SEC. A Form 10-K is an
2 annual report that provides a comprehensive overview of a company's business and financial
3 condition and includes audited financial statements. A Form 10-Q is a company's quarterly
4 report that provides a continuing view of the company's financial position during the year. A
5 Form 8-K is a "current report" that a public company must file whenever a major event occurs
6 that shareholders should know about. Companies are required to file Forms 10-K, 10-Q and
7 8-K by Section 13 of the Securities Exchange Act of 1934, as codified at Section 78m of Title
8 15 of the United States Code, and by related rules and regulations enacted by the SEC.

9 A Form S-4 is a report pertaining to mergers. Under Section 77a of Title 15 of the
10 United States Code, a company must file a Form S-4 with the SEC in relation to a business
11 combination or exchange offer such as a combination, merger or acquisition. It must include,
12 among other details, a detailed description of the proposed transaction's terms, as well as
13 information about the entities involved in the transaction.

14 20.

15 The SEC has statutory authority to establish financial accounting and reporting
16 standards for publicly-held companies under the Securities Exchange Act of 1934. SEC rules
17 require that publicly-held companies prepare their financial statements for external purposes in
18 accordance with Generally Accepted Accounting Principles, sometimes abbreviated as GAAP.
19 What are "Generally Accepted Accounting Principles"? These are standardized accounting
20 rules used to prepare, present, and report financial statements that all public companies must
21 follow. GAAP is designed to ensure that similar transactions at all U.S. public companies are
22 accounted for in a similar way, to allow investors to make apples-to-apples comparisons and to
23 provide reliable information to the investing public.

24 21.

25 I will now instruct you on specific counts or offenses on which defendants stand
26 accused in this case. In explaining the law to you I will use the present tense but all of the laws
27 in question applied equally back at the times in question. The indictment charges six counts,
28 namely four counts of securities fraud, one count of falsifying the books and records of a

1 public company, and one count of circumventing the internal controls of a public company.
2 All counts are charged against Charles W. McCall. Only Counts 1, 5 and 6 are charged against
3 Jay M. Lapine. Counts 2, 3 and 4 are not charged against Jay M. Lapine. Again, the
4 accusations in the indictment are not proof of guilt. It is the government's burden to prove
5 each element of the crime alleged beyond a reasonable doubt with actual evidence received
6 here at this trial.

7 22.

8 First, I will discuss the securities fraud counts.

9 Count One charges both defendants with securities fraud from December 1997 to April
10 27, 1999, in violation of 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5, and 18 U.S.C. 2.

11 Count Two charges defendant McCall with securities fraud in connection with the
12 Form 10-Q filed with the SEC for the period ended June 30, 1998, in violation of 15 U.S.C.
13 78j(b).

14 Count Three charges defendant McCall with securities fraud in connection with the
15 Form 10-Q filed with the SEC for the period ended September 30, 1998, in violation of 15
16 U.S.C. 78j(b).

17 Count Four charges defendant McCall with securities fraud in connection with the
18 registration statement filed on or about November 13, 1998, and the documents incorporated
19 by reference therein, in violation of 15 U.S.C. 77q(a), and 18 U.S.C. 2.

20 23.

21 Section 78j(b) of Title 15 of the United States Code states:

22 It shall be unlawful for any person, directly or indirectly, by the use of any
23 means or instrumentality of interstate commerce or of the mails, or of any
24 facility of any national securities exchange —

25 . . .

26 (b) To use or employ, in connection with the purchase or sale of any security
27 registered on a national securities exchange or any security not so registered . . .
28 any manipulative or deceptive device or contrivance in contravention of such

1 rules and regulations as the [Securities and Exchange] Commission may
2 prescribe as necessary or appropriate in the public interest or for the protection
3 of investors.

4 In this connection, the Securities and Exchange Commission has issued a regulation
5 called Rule 10b-5, which provides that it shall be unlawful for any person, directly or
6 indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or
7 of any facility of any national securities exchange,

8 (a) To employ any device, scheme, or artifice to defraud,

9 (b) To make any untrue statement of a material fact or to omit to state a material
10 fact necessary in order to make the statements made, in the light of the
11 circumstances under which they were made, not misleading, or

12 (c) To engage in any act, practice, or course of business which operates or
13 would operate as a fraud or deceit upon any person, in connection with the
14 purchase or sale of any security.

15 Section 77q(a) of Title 15 of the United States Code states:

16 It shall be unlawful for any person in the offer or sale of any securities. . . by the
17 use of any means or instruments of transportation or communication in
18 interstate commerce or by use of the mails, directly or indirectly

19 (1) to employ any device, scheme, or artifice to defraud, or

20 (2) to obtain money or property by means of any untrue statement of a
21 material fact or any omission to state a material fact necessary in order
22 to make the statements made, in light of the circumstances under which
23 they were made, not misleading; or,

24 (3) to engage in any transaction, practice, or course of business which
25 operates or would operate as a fraud or deceit upon the purchaser.

26 24.

27 Although I have read to you the language of several statutes set forth in the counts, the
28 statutes are similar and boil down to the following. In order for a defendant to be found guilty

1 on any of these four securities fraud charges, the government must prove each of the following
2 four elements beyond a reasonable doubt:

3 *First*, that said defendant used a device or scheme to defraud someone, made or caused
4 someone to make an untrue statement of material fact, or failed to disclose a material fact
5 which resulted in making the statements made misleading;

6 *Second*, that said defendant's acts or omissions were in connection with the purchase or
7 sale of HBOC or McKessonHBOC securities;

8 *Third*, that said defendant used the means or instrumentalities of interstate commerce,
9 including the telephone, wires, or mails or the facilities of a national securities exchange in
10 connection with these acts or omissions or with this failure to disclose. It is not necessary that
11 the untrue statement itself passed through the mail or over the telephone so long as the mail or
12 telephone was used as a part of the purchase or sale transaction.

13 *Fourth*, that said defendant acted willfully, knowingly, and with the intent to defraud
14 buyers or sellers of securities. To defraud someone in connection with the purchase or sale of
15 a security means to make a statement or representation which is untrue and known to defendant
16 to be untrue, or to fail to state something known to said defendant to be necessary to make
17 other statements not misleading, and which relates to something material to the purchase or
18 sale.

19 An act is done willfully if done voluntarily and intentionally with the purpose of
20 undertaking an act that one knows to be wrongful.

21 An act is done knowingly if a defendant is aware of the act and does not act or fail to
22 act through ignorance, mistake or accident. The government is not required to prove that said
23 defendant knew that his acts or omissions were unlawful. You may consider evidence of said
24 defendant's words, acts or omissions along with all the other evidence in deciding whether said
25 defendant acted knowingly.

26 You may find that a defendant acted with a purpose to defraud as to a statement or
27 failure to disclose if you find beyond a reasonable doubt that said defendant acted with
28 knowledge that the statement or failure to disclose was false or misleading, or with a reckless

1 disregard for the truth or falsity of that statement or failure to disclose. Reckless disregard
2 occurs when a statement is knowingly made without regard to its truth or falsity.

3 It is not necessary to prove that a defendant made a profit or that anyone actually
4 suffered a loss.

5 25.

6 Now I will turn to the charge of falsifying books, records and accounts of a public
7 company. Both defendants are charged in Count Five with falsifying books, records and
8 accounts of a public company, in violation of 15 U.S.C. 78m(b)(2)(A) and 78m(b)(5) and
9 Section 240.13b2-1 of Title 17 of the Code of Federal Regulations.

10 Paragraph 2(A) of Section 78m(b) of Title 15 of the United States Code states:

11 “Every issuer which has a class of securities registered pursuant
12 to [the Securities Exchange Act] and every issuer which is
13 required to file reports pursuant to [the Securities Exchange Act]
14 shall—

15 (A) make and keep books, records, and accounts,
16 which, in reasonable detail, accurately and fairly
17 reflect the transactions and dispositions of the
18 assets of the issuer.”

19 That section further provides in relevant part:

20 No person shall knowingly circumvent . . . a system of internal
21 accounting controls or knowingly falsify any book, record, or
22 account described in paragraph (2).

23 In order for a defendant to be found guilty of the charge of falsifying books, records
24 and accounts of a public company, the government must prove each of the following elements
25 beyond a reasonable doubt:

26 *First*, that HBOC and McKessonHBOC were required to make and keep books, records
27 and accounts which in reasonable detail accurately and fairly reflect the transactions and
28 dispositions of the assets of HBOC and McKessonHBOC;

1 (iv) the recorded accountability for assets is compared with the existing assets at
2 reasonable intervals and appropriate action is taken with respect to any differences.

3 As I stated before in regards to Count Five, Section 78m(b)(5) of Title 15 of the United
4 States Code states in relevant part that no person shall knowingly circumvent a system of
5 internal accounting controls or knowingly falsify any book, record, or account described in
6 Section 78m(b)(2).

7 What are “internal accounting controls”? Internal accounting controls are the system of
8 books and procedures of a company to provide reasonable assurance regarding the reliability of
9 financial reporting and the preparation of financial statements for external purposes in
10 accordance with Generally Accepted Accounting Principles.

11 In order for a defendant to be found guilty of circumventing internal accounting
12 controls the government must prove each of the following elements beyond a reasonable
13 doubt:

14 *First*, that HBOC and McKessonHBOC were required to devise and maintain a system
15 of internal accounting controls to provide reasonable assurances the transactions of HBOC and
16 McKessonHBOC were recorded as necessary to permit preparation of financial statements in
17 conformity with generally accepted accounting principles. All agree in this case that HBOC
18 and McKessonHBOC, as public companies were subject to this requirement.

19 *Second*, that said defendant knew that HBOC and McKessonHBOC were required to
20 maintain such a system of internal accounting controls;

21 *Third*, that said defendant circumvented or caused others to circumvent that system of
22 internal accounting controls; and

23 *Fourth*, that said defendant acted knowingly and willfully.

24 The government must prove beyond a reasonable doubt that said defendant acted with
25 knowledge that the system of internal accounting controls had been circumvented.

26 Again, the government is not required to prove that the circumvention of internal
27 accounting controls was material. In other words, the government does not need to prove that
28 the system of internal accounting controls was circumvented to a material degree.

1 The government must prove more than a breach of internal accounting controls. It
2 must prove beyond a reasonable doubt that defendant knowingly caused or aided and abetted
3 an intentional breach of the internal accounting controls. If the government proves that any
4 defendant knowingly caused or aided and abetted others in an intentional breach of the internal
5 accounting controls, the government is not required to prove that said defendant knew or
6 anticipated the full extent to which the breach was or would be abused.

7 27.

8 Now, I turn to a form of criminal liability called “aiding and abetting,” which is defined
9 in 18 U.S.C. 2. Defendant may be found guilty of securities fraud, false SEC filings, falsifying
10 the books, records and accounts of a public company, and circumventing the internal
11 accounting controls of a public company, even if defendant personally did not commit the act
12 or acts constituting the crime but aided and abetted someone else in its commission. To prove
13 a defendant guilty of aiding and abetting, the government must prove beyond a reasonable
14 doubt:

15 *First*, that a crime of securities fraud, false SEC filings, falsifying the books, records
16 and accounts of a public company, or circumventing the internal accounting controls of a
17 public company was committed by someone;

18 *Second*, that said defendant knowingly and intentionally aided, counseled, commanded,
19 induced, or procured a person or persons to commit each element of that crime of securities
20 fraud, false SEC filings, falsifying the books, records and accounts of a public company, or
21 circumventing the internal accounting controls of a public company;

22 *Third*, that said defendant acted before the crime was completed.

23 It is not enough that said defendant merely associated with a person or persons
24 committing the crime, or unknowingly or unintentionally did things that were helpful to that
25 person or persons, or was present at the scene of the crime.

26 The evidence must show beyond a reasonable doubt that said defendant acted with the
27 knowledge and intention of helping that person or persons commit the crime of securities
28

1 fraud, false SEC filings, falsifying the books, records and accounts of a public company, or
2 circumventing the internal accounting controls of a public company.

3 The government is not required to prove precisely if said defendant actually committed
4 the crime or if defendant aided and abetted, so long as the government proves all elements of
5 one or the other.

6 28.

7 For most counts, the government must prove materiality. For other counts, materiality
8 is not an element of the offense. Now, what does “material” mean? A fact stated or omitted is
9 material if a reasonable investor would normally, given all of the other information provided,
10 find the information important in deciding whether to buy or sell a security.

11 With respect to any count requiring materiality, if the government has proven that any
12 defendant knew of any false financial reporting, then the government need not prove that said
13 defendant was aware of the full or exact scope of such fraudulent reporting so long as the
14 government proves said defendant or defendants were aware that the extent of the fraudulent
15 account was liable to be material in scope and that, in fact, it was material in scope.

16 29.

17 The good faith of a defendant constitutes a complete defense to any charge against him
18 as to which you find that said defendant acted in good faith. A person who acts with an honest
19 intention does not possess fraudulent intent. A person who expresses a belief or opinion
20 honestly held does not have fraudulent intent even if his opinion is erroneous and his belief is a
21 mistaken belief. Finding that a defendant merely made a mistake of judgment or an error in
22 management or was careless is therefore not sufficient to establish fraudulent intent. The
23 burden of proving criminal intent rests on the prosecution. A defendant is under no burden to
24 prove good faith.

25 30.

26 The punishment provided by law for the alleged crimes is for the Court to decide, if a
27 guilty verdict is returned. You may not consider punishment in deciding whether the
28 government has proven its case against either defendant beyond a reasonable doubt.

1 Punishment is an entirely separate matter not relevant here and on which you should not
2 speculate or base your decision in any way.

3 31.

4 When you begin your deliberations, you should elect one member of the jury as your
5 foreperson. That person will preside over the deliberations and speak for you here in court.

6 You will then discuss the case with your fellow jurors to reach agreement if you can do
7 so. Your verdict as to each count, if any, must be unanimous. Each of you must decide the
8 case for yourself, but you should do so only after you have considered all of the evidence,
9 discussed it fully with the other jurors, and listened to the views of your fellow jurors.

10 Do not be afraid to change your opinion if the discussion persuades you that you
11 should. Do not come to a decision simply because other jurors think it is right. It is important
12 that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after
13 having made your own conscientious decision. Do not change an honest belief about the
14 weight and effect of the evidence simply to reach a verdict.

15 I will give you a special verdict form to guide your deliberations. However, you may
16 deliberate over the counts in any order you wish and you do not need to address the questions
17 in the precise order listed.

18 32.

19 Some of you have taken notes during the trial. Whether or not you took notes, you
20 should rely on your own memory of what was said. Notes are only to assist your memory.
21 You should not be overly influenced by your notes. When you go into the jury room, the Clerk
22 will bring you the trial exhibits received into evidence to be available for your deliberations.
23 The Clerk will also provide you with an index to the exhibits.

24 33.

25 When you retire to the jury room to deliberate, you will have with you the following things:

- 26 1. All of the exhibits received into evidence;
- 27 2. An index to the exhibits;
- 28 3. A work copy of these jury instructions for each of you;

1 deliberations by 8:00 A.M. If you do not reach a verdict by the end of today, then you will
2 resume your deliberations tomorrow and thereafter.

3 It is very important that you let the Clerk know in advance what hours you will be
4 deliberating so that the lawyers may be present in the courthouse at any time the jury is
5 deliberating.

6 36.

7 You may only deliberate when all of you are together. This means, for instance, that in
8 the mornings before everyone has arrived or when someone steps out of the jury room to go to
9 the restroom, you may not discuss the case. As well, the admonition that you are not to speak
10 to anyone outside the jury room about this case still applies during your deliberation.

11 37.

12 Some of you are serving as alternate jurors. As such, you will not be deliberating with
13 the rest of the jury at the outset. You leave before the jury begins its deliberations. You may,
14 however, be called in to replace one of the jurors. Your responsibilities as an alternate
15 therefore remain in effect. This means you are not to discuss this case with anyone until you
16 join the regular jury in deliberations or until a verdict is returned and I expressly release you
17 from service. If it becomes necessary to have you replace a juror, you will be asked to return
18 to the court. You will then be sworn into the main jury and you and the rest of the jury will
19 begin deliberations anew. If you will not be needed, you will be notified as soon as the Court
20 itself makes that determination.

21 Sometimes alternate jurors are tempted to tell the main twelve jurors how they feel
22 about the case before they leave and sometimes the main twelve jurors are tempted to seek the
23 input of the alternates before the alternates leave. No, you must not do this. The twelve jurors
24 may not receive or consider the views of the alternates unless and until, if ever, one or more
25 alternates are sworn into the main jury.

26 38.

27 If and when you have reached a unanimous agreement on a verdict, your foreperson
28 will fill in, date and sign the master copy of the verdict form and advise the Court that you

1 have reached a verdict. The foreperson should hold onto the filled-in verdict form and bring it
2 into the courtroom when the jury returns the verdict.

3 I am about to ask all of you to return to the jury room. Our alternate jurors should first
4 proceed to the jury room and retrieve their personal items and return to work or home, as the
5 case may be. As soon as they have done so, the marshal will then escort the remaining twelve
6 jurors to the jury room. Please do not begin your deliberations until all twelve of you are in the
7 jury room together and the alternate juror has left. The Clerk will bring the trial exhibits into
8 the jury room. Thank you all for your careful attention. The case is now in your hands. You
9 may now retire to the jury room and begin your deliberations.

10
11
12 Dated: November 16, 2009.

13 WILLIAM ALSUP
14 UNITED STATES DISTRICT JUDGE
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

No. CR 00-0505 WHA

v.

**PROPOSED SPECIAL
VERDICT FORM**

CHARLES W. McCALL and JAY M.
LAPINE,
Defendants.

YOU MAY APPROACH THE FOLLOWING QUESTION IN ANY ORDER YOU
WISH, BUT YOUR ANSWERS MUST BE **UNANIMOUS**.

1(a). Has the government proven
beyond a reasonable doubt that
defendant Charles W. McCall is
guilty of securities fraud as
charged in Count One?

1(b). Has the government proven
beyond a reasonable doubt that
defendant Jay M. Lapine is guilty
of securities fraud as charged in
Count One?

Yes, Guilty _____

Yes, Guilty _____

No, Not Guilty _____

No, Not Guilty _____

United States District Court
For the Northern District of California

1 2. Has the government proven
2 beyond a reasonable doubt that
3 defendant Charles W. McCall is
4 guilty of securities fraud in
5 connection with a false SEC filing
6 for the quarter ended June 30,
7 1998, as charged in Count Two?

8
9 Yes, Guilty _____

10 No, Not Guilty _____

11
12
13
14 3. Has the government proven
15 beyond a reasonable doubt that
16 defendant Charles W. McCall is
17 guilty of securities fraud in
18 connection with a false SEC filing
19 for the quarter ended September
20 30, 1998, as charged in Count
21 Three?

22
23 Yes, Guilty _____

24 No, Not Guilty _____

1 4. Has the government proven
2 beyond a reasonable doubt that
3 defendant Charles W. McCall is
4 guilty of securities fraud in
5 connection with a false registration
6 statement as charged in Count
7 Four?

8
9 Yes, Guilty _____

10 No, Not Guilty _____

11
12
13
14 5(a). Has the government proven
15 beyond a reasonable doubt that
16 defendant Charles W. McCall is
17 guilty of falsifying books, records
18 and accounts as charged in Count
19 Five?

20 Yes, Guilty _____

21 No, Not Guilty _____

22
23
24
25 5(b). Has the government proven
26 beyond a reasonable doubt that
27 defendant Jay M. Lapine is guilty
28 of falsifying books, records and
accounts as charged in Count
Five?

Yes, Guilty _____

No, Not Guilty _____

6(a). Has the government proven
beyond a reasonable doubt that
defendant Charles W. McCall is
guilty of circumventing internal
accounting controls as charged in
Count Six?

6(b). Has the government proven
beyond a reasonable doubt that
defendant Jay M. Lapine is guilty
of circumventing internal
accounting controls as charged in
Count Six?

Yes, Guilty _____

Yes, Guilty _____

No, Not Guilty _____

No, Not Guilty _____

CONCLUSION

ONCE YOU HAVE FINISHED ANSWERING ALL QUESTIONS
UNANIMOUSLY, PLEASE HAVE THE FOREPERSON SIGN AND DATE THIS FORM,
THEN CONTACT THE DEPUTY OR MARSHAL TO INFORM HIM OR HER THAT
YOU HAVE COMPLETED YOUR DELIBERATIONS.

Dated: _____

Foreperson